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Opinion No. 05-030

Constitutionality of Amendment to Definition of “Adult Bookstore” in the Adult-Oriented Establishment Registration Act

QUESTION

Proposed House Bill 31/Senate Bill 78 amends the Adult-Oriented Establishment Registration Act by clarifying the scope of the definition of “adult bookstore,” found at Tenn. Code Ann § 7-51-1102(1). If passed, would this statutory change be constitutional?

OPINION

This proposed statutory amendment is constitutionally defensible.

ANALYSIS

Proposed House Bill 31/Senate Bill 78 would amend the Adult-Oriented Establishment Registration Act, Tenn. Code Ann. § 7-51-1101, *et seq.*, (“Registration Act”), to clarify the scope of the definition of “adult bookstore” at Tenn. Code Ann. § 7-51-1102(1). The amendment adds the following highlighted language to the existing statutory definition:

- (1) “Adult bookstore” means a business which offers, as its principal or predominate stock or trade, sexually-oriented material, devices, or paraphernalia, specified sexual activities, or any combination or form thereof, whether printed, filmed, recorded or live and which restricts or purports to restrict admission to adults or to any class of adults ***and such definition shall specifically include items such as adult novelties, risque gifts or marital aids that are, regardless of how labeled or sold, sexually oriented in nature*** [.]

(emphasis added). Senate Bill 78 contains a severability clause, which specifies the existing statutory definition is reinstated if this amendment is deemed unconstitutional.

Tennessee Courts have upheld the validity of the Registration Act in light of a variety of constitutional challenges, including that the Registration Act violates guarantees of free speech and free expression in the First Amendment of the United States Constitution and Article I, Section 19 of the Tennessee Constitution. *American Show Bar Series, Inc. v. Sullivan County*, 30 S.W.3d 324 (Tenn. App. 2000), *perm. app. denied*. The intermediate scrutiny test for constitutional validity was applied by Tennessee courts to find that the Act is a content-neutral time, place, and manner

regulation enacted to address deleterious secondary effects commonly associated with adult-oriented establishments. *Id.*, at 332-336. The United States District Court for the Western District of Tennessee at Jackson has also upheld the constitutional validity of the Registration Act. *Herbert Odle d/b/a Sports Club, Inc. v. Decatur County*, No. 02-1278 (W.D. Tenn., Oct. 14, 2003) (Judge Todd). A challenge to the constitutional validity of the Registration Act is also pending in *Paul Friedman d/b/a Expressway Books & Gift, v. Giles County, et al*, No. 1-00-0065 (M.D. Tenn.) (Judge Higgins).

The definition of “adult-oriented establishment” in the Adult-Oriented Establishment Act, which restricts the hours of operations and physical configuration of certain adult-oriented establishments, is substantially similar to the current definition of “adult bookstore” in the Registration Act. That act at Tenn. Code Ann. § 7-51-1401(4) specifies:

“Adult-oriented establishment” means any commercial establishment, business or service, or portion thereof, which offers, as its principal or predominate stock or trade, sexually-oriented material, devices, or paraphernalia or specified sexual activities, or any combination or form thereof, whether printed, filmed, recorded or live and which restricts or purports to restrict admission to adults or any class of adults.

The provisions of the Adult-Oriented Establishment Registration Act, have been found to be a constitutionally valid means of addressing deleterious secondary effects at adult-oriented establishments, in light of a variety of challenges. *Richland Bookmark, Inc. v. Nichols*, 137 F.3d 435 (6th Cir., 1998), *cert denied*; *Silver Video USA, Inc., d/b/a/ Silver Video USA, et al v. Paul G. Summers, et al*, No. 03C-3488(Davidson Circuit, Feb. 25, 2004), *app. pending* (court upheld constitutional validity of applying the act’s restrictions to adult-oriented establishments that do not allow on-premises viewing of adult-oriented materials, but rather sell videos, magazines, and adult novelties for off-premises utilization only). Typically adult novelties, risqué gifts, or marital aids do not directly involve the dissemination of constitutionally-protected speech.

The Registration Act’s proposed definition of “adult bookstore,” would likely survive a vagueness challenge. As set forth in *American Show Bar*, 30 S.W.3d at 339:

“It is the basic principal of due-process that an enactment is void for vagueness if its prohibitions are not clearly defined.” *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 2298 (1972). An ordinance is unconstitutionally vague when a person of “common intelligence must necessarily guess at its meaning.” *Broderick v. Oklahoma*, 413 U.S. 601, 607, 93 S.Ct. 2908, 2913. To avoid unconstitutional vagueness, a statute “must ‘define a criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.’” *Davis-Kidd Booksellers, Inc. v. McWhorter*, 866 S.W.2d 530, 532 (Tenn. 1993) (quoting *Kolender v. Lawson*, 461 U. S. 352, 358, 103 S.Ct. 1855, 1858 (1993))

The proposed legislation does not expand but merely clarifies the scope of the existing definition of “adult bookstore” and would likely be found constitutionally valid if challenged for vagueness. The proposed legislation clarifies that, “regardless of how labeled or sold,” material, devices, or paraphernalia which are “sexually-oriented in nature” are within the scope of the definition, specifically including “adult novelties, risqué gifts or marital aids.” As with the similar definition deemed constitutional in *Richland Bookmark*, wherein a challenge for vagueness was rejected, for one to be within the purview of act the establishment must meet two specific requirements. In reversing the district courts finding of unconstitutional vagueness, the Sixth Circuit in *Richland Bookmart* held:

The law is not as vague as the bookstore contends. To be included within the purview of the act, an establishment must (1) have as its “principal or predominate stock or trade” sexually-oriented materials, devices or paraphernalia and (2) restrict admission to adults only. The terms used in the act are understandable common terms. Most buyers, sellers and judges know what such materials are and who are adults and who are children.

The same analysis should apply to a potential challenge to the proposed legislation on grounds of vagueness.

Moreover, courts regularly find that a successful challenge for vagueness cannot be brought by an establishment which clearly falls within the purview of the challenged statute. In *Richland Bookmark*, the court determined that the plaintiff adult bookstore was clearly an “adult-oriented establishment” as defined in that act so that there was no element of vagueness that affected that plaintiff. 137 F.3d at 441 (citing *Young v. American Mini Theatres, Inc.*, 427 U. S. 50, 58-59, 96 S.Ct. 2440, 2446-47 (1976) (court finds it unnecessary to consider vagueness with an otherwise valid ordinance indisputably applied to that plaintiff, as there was no vagueness as to that challenger).

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Page 4

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